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Co-Counsel for Defendant, Counterclaimant  
and Cross-Defendant, Westbrook Fanita Ranch,  
L.P.

**UNITED STATES BANKRUPTCY COURT**

**SOUTHERN DISTRICT OF CALIFORNIA**

In re  
FANITA RANCH, L.P., a California limited  
partnership,

Debtor-in-Possession.

CASE NO. 10-05750-MM11

**STATUS REPORT AND EX PARTE  
REQUEST FOR STAY OR DISMISSAL OF  
PENDING SALE MOTION**

Dept: One (1)  
Honorable Margaret M. Mann

Westbrook Fanita Ranch, L.P. ("Westbrook"), a creditor holding a secured claim in these proceedings, provides this updated status report for the Court and also requests, *ex parte*, that the Debtor's recently filed Motion for Sale of Real Property, as described below, be denied without prejudice or, alternatively, stayed until entry of further order of this Court, and asserts as follows:

**Counsel for the Debtor.**

The Court has recently entered its minute order declining the Debtor's application to employ its general insolvency counsel, William Smelko, because of irreconcilable conflicts

1 of interest. Mr. Smelko has advised the Court that the Debtor intends to seek his  
2 employment as special counsel in connection only with the Debtor's adversary proceeding  
3 (Case No.10-90204). In the court's tentative ruling (Docket no. 40) confirmed on July 27,  
4 2010 as the order of the Court, certain items are required in any application for the Debtor's  
5 retention of Mr. Smelko. They are (1) disclosure of the actual retention agreement or all its  
6 terms and the retention agreement between Mr. Smelko and any insiders or related entities;  
7 (2) a detailed explanation of all pre-petition billings and payments, including a detailed  
8 description of the pre-petition work done for the Debtor and any other entities whose fees  
9 were paid by the \$26,500 pre-petition fee and (3) an explanation of whether the \$26,500 is  
10 now a debt owed to Mr. Armstrong, one of the Debtor's principals

11 Almost a week after the Court has ruled, there has been no supplemental application  
12 filed. Without at least submittal of an application to employ Mr. Smelko as Special Counsel  
13 in accord with the Court's requirements for his retention as Special counsel, it is submitted  
14 he cannot argue on the Debtor's behalf at the continued hearings now set for the Adversary  
15 proceeding on August 5, 2010. While Westbrook abhors additional delay in this matter,  
16 clients will be travelling across country to attend the August 5 hearing, and would avoid the  
17 trip if the Debtor could not appear and the hearing did not go forward.

18 **The Sale Motion and Ex Parte Request.** The conflict disabling Mr. Smelko's  
19 retention as general chapter 11 counsel was premised upon the fact that Mr. Smelko had  
20 represented one or more environmental groups interested in acquiring the Debtor's sole  
21 asset, approximately 2,900 acres of real property located in Santee, California (the "Real  
22 Property"). During the morning session of the two-part July 27, 2010 hearing to consider the  
23 Debtor's employment of Mr. Smelko, the Court requested that Mr. Smelko produce a copy  
24 of any contract for the sale of the Real Property by the Debtor to any third party to the Court  
25 and to interested parties. The Court adjourned the morning session of the hearing and  
26 reconvened the parties at 3:30 p.m. later that same day.

27 Between the morning adjournment and commencement of the afternoon hearing, the  
28 Debtor filed: (1) Fanita Ranch L.P.'s motion to sell the Real Property free and clear of liens,

1 attaching as Exhibit A, the purchase and sale agreement between the Debtor and  
2 Endangered Habitats Conservancy (Docket No. 49) (the "Sale Motion"); and (2) Fanita Ranch  
3 L.P.'s notice of hearing and motion and certificate of service regarding motion to sell real  
4 property free and clear of liens (Docket No. 51). The hearing on the Sale Motion is  
5 calendared for September 16, 2010 at 2:00 p.m. Pursuant to the notice and applicable rules,  
6 any opposition to the motion is due on or before August 13, 2010.

7 The text of the Sale Motion states (Pg. 2, ¶8) that it is supported by the "to be filed"  
8 (1) memorandum of points and authorities and (2) Declaration of Michael Armstrong.  
9 Accordingly, the Sale Motion was not accompanied by a memorandum of Points and  
10 authorities and with evidentiary support, as expressly required by Bankruptcy Local Rule  
11 9014-2. Mr. Smelko is disqualified from filing the contemplated memorandum and  
12 declaration, and these items cannot be filed until new chapter 11 counsel is retained and  
13 approved, and has had time to analyze these issues.

14 The Debtor's contract with Endangered Habitats Conservancy seems to have been  
15 negotiated by and with the involvement of Mr. Smelko. Given his prior representation of  
16 the environmental groups in connection with their efforts to acquire title to the real property,  
17 the contract and the motion itself appear to be tainted with that conflict. Indeed, as noted by  
18 the Court, several provisions of the contract appear highly questionable including: (1) the  
19 existence of a \$100 down payment deposit on a \$36,000,000 transaction; (2) an open ended  
20 period of time for closing of the transaction and (3) the requirement that any other entity  
21 bidding provide a \$2 Million cash deposit (as compared to the proposed buyer's \$100  
22 deposit).

23 Westbrook does not believe that a sale of property pursuant to the contract signed by  
24 the Debtor and purported and proposed buyer can be confirmed under applicable  
25 provisions of the Bankruptcy Code. Accordingly, Westbrook intends to vigorously object to  
26 the Debtor's efforts to sell the real property free and clear of Westbrook's lien. In  
27 connection with that opposition, Westbrook intends to conduct discovery to support its  
28 position against the Debtor's sale of the Real Property free and clear of Westbrook's lien.

1 Discovery will be needed to obtain all communications between the Debtor and its  
2 representatives on the one hand and the buyer and its representatives on the other hand  
3 Depositions of the Debtor's principals and principals of the purported buyer will be  
4 necessary, as well.

5 As of this writing, the Debtor has not yet secured replacement counsel required to  
6 represent the Debtor's interests in connection with prosecution of the chapter 11 case and  
7 the sale motion. In this interim period, before replacement counsel is identified and  
8 approved by this Court as general bankruptcy counsel, the Debtor as unrepresented is in  
9 essence rudderless and incapable of responding to requests for discovery. .

10 Rather than immediately propounding discovery on the Debtor, as would otherwise  
11 be authorized by Bankruptcy Rule of Procedure 9014(c), Westbrook seeks this Court's order  
12 denying the Debtor's sale motion without prejudice or, in the alternative, that an order be  
13 entered staying the sale motion in its entirety until further order of the Court, or upon  
14 replacement general counsel's refiling and re-noticing the sale motion.

15 WHEREFORE, for the reasons expressed above, Westbrook respectfully requests that  
16 this Court enter its order either (1) denying the sale motion without prejudice or, in the  
17 alternative, (2) staying the sale motion until it is refiling and re-notice by replacement  
18 general Bankruptcy counsel.

19 DATED: August 3, 2010

Respectfully submitted,

20 SOLOMON WARD SEIDENWURM & SMITH, LLP

21  
22 By: 

23 MICHAEL D. BRESLAUER  
24 Attorneys for Debtor  
25  
26  
27  
28

**PROOF OF SERVICE**

I, Nadja Fabian, declare as follows:

I am employed in the County of San Diego, State of California; I am over the age of eighteen years and am not a party to this action; my business address is Solomon Ward Seidenwurm & Smith, LLP, 401 B Street, Suite 1200, San Diego, CA 92101, in said County and State. On **August 3, 2010**, I served the following document(s):

**STATUS REPORT AND EX PARTE REQUEST FOR STAY OR DISMISSAL OF PENDING SALE MOTION**

on each of the interested parties stated on the attached service list.

**I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF"):**

Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On **August 3, 2010**, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the e-mail address(es) indicated below:

Office of the United States Trustee	ustp.region15sop@usdoj.gov tiffany.l.carroll@usdoj.gov
William A. Smelko, Esq.	wasmelko@aol.com
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Richard T. Egger, Esq.	Richard.egger@bbklaw.com

☐ Service information continued on attached page

**II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL:** On **August 3, 2010**, I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows.

☒ Service information continued on attached page

**III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR E-MAIL:**

Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **August 3, 2010**, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or e-mail as follows.

☒ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: August 3, 2010

By: 

NADJA FABIAN

**PROOF OF SERVICE LIST**

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